No. 92-522

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH GARDNER, ET AL.,

Appellants,

vs.

ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a redistricting plan violates the Voting Rights Act, 42 U.S.C. §§ 1973, et seq., when, as a result of that redistricting plan, politically cohesive African-American communities are split into diverse legislative districts, the portions of those formerly discrete African-American communities are then jointed with other fractions of other African-American communities until a supermajority (65% or greater) African-American population is merged with traditionally powerful, politically active and unified white communities on Chicago's south side, where victory in the primary election is tantamount to victory in the general election due to one-party dominance.

2. Whether the three-judge court, when passing on the legality of the

redistricting plan for the Illinois General Assembly, properly refused to consider election results from the March 17, 1992 primary elections, when the election results in four of the districts challenged by appellants demonstrated appellants' contention that the redistricting plan--which splintered existing African-American communities, combined those fragments of existing communities with fragments of rival African-American communities and placed those pieces of African-American communities with dominant, unified white communities--would impair the ability of African-Americans to elect candidates of choice, particularly in primary elections.

3. Whether the redistricting plan for the Illinois General Assembly violates the Voting Rights Act by failing to create

a representative district on the northwest side of the City of Chicago with a 50% Hispanic population, when such a district could be created without impairing the effectiveness of adjoining supermajority Hispanic districts or frustrating any expressed state interest or intent served by the challenged redistricting plan and such a district configuration would maximize Hispanic political empowerment and the ability of Hispanics to elect candidates of that community's choice.

4. Whether the redistricting plan for the Illinois General Assembly violates the Voting Rights Act by failing to create districts in cities throughout Illinois which maximize minority populations in those districts (albeit less than a majority of those districts' population), where significant numbers of minorities

reside in those urban communities and election data demonstrate an ability of those minorities to choose the candidate of those minorities' choice from between the partisan preferences of the white population, while the district configurations actually employed deny the minorities the ability to "swing" elections from one partisan choice of the white population to the other.

5. Whether the redistricting plan for the Illinois General Assembly also violates the Fourteenth and the Fifteenth Amendments to the United States Constitution when the impact of the redistricting plan ultimately adopted by the state was the subject of briefs, and testimony (both through "fact" or occurrence witnesses and expert witnesses) and no expressed state interest was served

by selecting the redistricting plan ultimately adopted over alternate proposals which did not visit the discriminatory harms upon minorities caused by the plan adopted.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

The Illinois Legislative Redistricting Commission ("Commission") and its Republican majority members, all appellees herein[1], initiated this action

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[1]The original plaintiffs, in addition to the Commission, included Al Jourdan, Frank Watson, Robert Churchill, Gene Hoffman and Dallas Ingemunson. In the District Court, David Reed also sought to join the suit as an additional party plaintiff. He is not an appellee before this Court, as no relief was sought against him at the trial on the Gardner counterclaim. Illinois Secretary of State George Ryan and the Illinois State Board of Elections were joined as counterdefendants in the Gardner counterclaim, and they are appellees in this Court. With the exception of Mr. Reed, these parties, collectively, will be referred to as the appellees.

on October 4, 1991, in the United States District Court for the Northern District of Illinois ("District Court") seeking a declaration that the redistricting plan approved by the Commission on that same day complied with relevant federal and state laws. The action was initiated against Gary J. LaPaille, Chairman of the Illinois State Democratic Central Commmittee, the Democratic members of the Commission[2], an Hispanic State Senator and a political activist apparently named as a defendant because he is an African-American who had advocated a redistricting scheme different than the one adopted by

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[2]Jim McPike, Thomas Lyons, Eartharin Cousin and Jerome Joyce.

the Commission. Eventually, appellants, Joseph Gardner, et al.,[3] were named as defendants along with many others.[4]

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[3]The Gardner defendants-counter-plaintiffs, appellants in this Court, included Joseph Gardner, Lovana Jones, Dan Barreiro, William Shepard, Jr., John Lee Johnson, Gwendolyn Scott, Laura Barth, Warren Dorris, Marvin French, Jayme Cain, Percy Conway, Joseph Belman, Luis Albarasin, Crotis Teague, Jr., Henry Landrau, Carolyn Toney, Fred Smith, Charlie Wilson, Jr., and Bobby E. Thompson.

[4]These defendants, some of whom were counter-plaintiffs, included Henry Martinez, Roberto Gonzalez, Anita Garcia, Maria A. Morales, Marta Caldero, Consuelo Zemaitis, J. Richard Mota, Dave Duran, Teresa Fraga Orosco, Beverly Area Planning Association, William Gainer, Mt. Grenwood Civic Association, Curt Mentzer, Paula Derback, Sharon Hanlon, Thomas C. Hynes, Jeremiah Joyce, James Keane, Thaddeus Lechowicz, Robert J. Bugielski, Polish American Congress, Inc., Rebecca W. Owens, Gay E. Bruhn, Mary Finger, Marisa L. L'Heureux, Carole Travis, Wilfred G. Stewart, Mary Ellen Smyth, Sara Thompson, Mary Mari Anna Murphy, Ava George, Sandra M. Scott, Illinois Attorney General Roland W. Burris, State Senator Miguel del Valle

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(an original defendant), Bruce Crosby (an original defendant), Mervin A. Mendez, Matias Rico, Heimelinda Ortega, The Task Force for Black Political Empowerment, Sen. Howard Brookins, Sen. Earlean Collins, Sen. Alice Palmer, Association for Political and Economic Influence, Timuel Black and Robert Starks. Of these defendants, Mervin Mendez, Metias Rico and Heimelinda Ortega also appealed the decision of the three-judge court.

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CITATIONS TO OPINIONS BELOW

This case was filed on October 4, 1991 as an action for declaratory relief. No final redistricting plan emerged from the Commission and the Illinois Supreme

Court, however, until January 10, 1992, and the action before the District Court remained essentially dormant until a final redistricting plan was approved by the state system. Thereafter, the matter proceeded to trial before the three-judge District Court on the appellants' and others' challenge to the legality of the final state redistricting plan, and on March 11, 1992, the District Court issued its opinion finding the redistricting plan valid under federal law. Illinois Legislative Redistricting Commission v. Gary LaPaille, et al., 786 F. Supp. 704 (N.D. Ill. 1992). The opinion is attached to this Jurisdictional Statement as Appendix 1-58. On June 11, 1992, the District Court issued its order denying the appellants' motion for a new trial. Illinois Legislative Redistricting

Commission v. Gary LaPaille, et al., 792 F. Supp. 1110 (N.D. Ill. 1992). On June 15, 1992, the District Court's order was docketed. The order is attached to this Jurisdictional Statement as Appendix 59-67.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1253. The three-judge United States District Court for the Northern District of Illinois entered an Order on March 11, 1992, and pursuant to United States Supreme Court Rule 18.3 and 28 U.S.C. §2101, the present Jurisdictional Statement is timely and appropriate for this Court's consideration. On March 26, 1992, the appellants moved the District Court for a new trial, and the District Court denied

that motion on June 11, 1992 (docketed June 15, 1992).

The District Court had jurisdiction to consider the case pursuant to 28 U.S.C. §§ 1331, 1334 and 2284.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment (XIV)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [U.S. Const. amend. XIV.]

U.S. Const., Amendment (XV)

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.
[U.S. Const. amend. XV.]

42 U.S.C. §1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation.

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS §1973(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section

establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. [42 U.S.C §1973 (1982).]

STATEMENT OF THE CASE

On October 4, 1991, the Illinois Legislative Redistricting Commission ("Commission"), on a 5-4 vote along party lines, approved a redistricting plan for the Illinois General Assembly. That same day, the Commission and its five Republican members brought a declaratory judgment action in the District Court, seeking a declaration that the redistricting plan complied with the United States Constitution, the Voting Rights Act and the Illinois Constitution of 1970, as amended.

Over the next three months, the federal court litigation remained essentially dormant, as the legality of the Commission's October 4 redistricting

plan was tested, on state law bases, before the Illinois Supreme Court.[5] On December 13, 1991, the Illinois Supreme Court refused to approve the October 4 redistricting plan and remanded the matter to the Commission for further review. People ex rel. Burris v. Ryan, 147 Ill.2d 270, 588 N.E.2d 1023 (1992). The Commission held hearings from January 4 through January 6, 1992, and passed a modified redistricting plan on January 6,

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[5] Principally, the litigation in federal court during the time the Illinois Supreme Court considered the redistricting plan's legality under the Illinois Constitution of 1970 related to questions of removal of state court proceedings to the district court, joinder of additional and necessary parties, attempts by appellees to enjoin proceedings mandated by the Illinois Supreme Court and the standing of the original plaintiffs to seek declaratory relief. Once final approval of redistricting plan was given by the Illinois Supreme Court, the federal court litigation proceeded to the merits of claims of violations of federal law caused by that plan.

1992. On January 10, 1992, the Illinois Supreme Court approved the newly modified redistricting plan, and it issued its opinion on January 14, 1992. (People ex rel. Burris v. Ryan, 147 Ill.2d 270, 588 N.E.2d 1033 (1992).

On January 17, 1992, appellants filed their counterclaim to the appellees' third amended complaint for declaratory judgment, asserting challenges under federal law to the redistricting plan approved by the Illinois Supreme Court. Appellants were permitted to file an amended counterclaim on February 3, 1992.

The amended counterclaim, lying in four counts, asserted that certain districts as configured in the approved redistricting plan violated the rights of appellants under the Voting Rights Act and the Fourteenth and Fifteenth Amendments to

the United States Constitution, in essence, denying African-Americans and Hispanics a fair opportunity to elect candidates of their choice. A five-day trial was held before the three-judge court, and, as part of that trial, appellants filed with the District Court the evidence presented before the Illinois Supreme Court and the Commission in connection with the January 1992 hearing conducted by the Commission. Thus, the evidence before the District Court consisted largely of unrebutted affidavits, declarations and documentary exhibits. Many of these affidavits and declarations contained opinions and statements from persons, elected officials and others, who have knowledge of the political realities of life in Chicago and other areas around the State of Illinois.

In addition to the evidence presented to the Commission and the Illinois Supreme Court, the three-judge court received affidavits from expert and anecdotal witnesses, and it heard then in-court testimony of three expert witnesses, Mr. Kimball Brace (appellants' expert), Dr. G. Gordon Henderson (the Mendez appellants' expert) and Professor Richard Engstrom (appellees' expert).

The evidence presented to the Commission and re-submitted to the court illustrated the past and present effects of discrimination in the State of Illinois. For example, the evidence, including census data, exposed the great disparity between whites and non-whites in areas such as: (1) persons who hold elective office, (2) income levels, (3) persons living below the poverty level,

(4) persons who own their own homes, (5) persons who live in lower quality housing stock, (6) education levels, (7) the number of white teachers relative to non-white enrollment, (8) employment, and (9) infant mortality rates.

Appellants also presented evidence that certain districts on the South Side of Chicago were configured in such a way as to disrupt and fracture existing communities of interest among African-Americans, combine the fragments of those communities with fragments of other, potentially rival African-American communities and pit those combined fragments of rival African-American communities against strong, politically cohesive and effective white political organizations. In addition, appellants offered expert testimony tending to

demonstrate that in urban areas in Illinois outside Chicago, minority populations were sufficiently large and partisan differences among whites sufficiently sharp to permit districts to be drawn in such a way to enable the minority population, if unified, to elect its candidate of choice between the partisan preferences of the white population and "swing" elections from one candidate to another. In this regard, appellants' expert relied upon historical election data and accepted demographic and statistical techniques to demonstrate that in past elections the vote totals of minorities in various urban areas were sufficient in specific election contests to overcome the white population's preference for one candidate over another and, in fact, had been outcome-

determinative in certain elections in which the minority population's preferred candidate was not the candidate of choice among white voters.

Appellees, on the other hand, offered raw numbers of percentages of population figures and electoral results as to the challenged districts in support of their contention that the redistricting plan as configured met the concerns advanced by appellants. Appellees' expert also questioned the reliability and statistical validity of Mr. Brace's analysis of election and population data as it related to Illinois urban areas outside of Chicago and the ability of the minority populations in those areas to "swing" elections.

The District Court issued its opinion on March 11, 1992, upholding the

redistricting plan as complying with the Voting Rights Act and the 14th and 15th Amendments to the United States Constitution, and holding that the plan provides a meaningful opportunity for minority voters to elect candidates of their choice.

On March 17, 1992, subsequent to the close of proofs and the issuance of the District Court's opinion, the State of Illinois conducted primary elections, including primary elections for the Illinois General Assembly. In various of those elections, including supermajority African-American districts in Chicago challenged by appellants in the District Court as not being effective supermajority districts due to the disparate fragments of rival African-American communities placed in primary contests with unified

and powerful white communities, the election returns confirmed appellants' claim that African-Americans would not have a fair opportunity to elect candidates of their choice, as white candidates secured the Democratic Party nominations even though the population of each district was at least 65% African-American. Based on these returns, appellants brought a motion for a new trial as to those challenged districts. The District Court denied the appellants' motion for a new trial on June 11, 1992. The District Court found that the election returns did "not sufficiently cast doubt upon the trial result so as to warrant a new trial." LaPaille, 792 F.Supp. at 1112. (App. 64). The District Court's June 11, 1992 Opinion was docketed on June 15, 1992.

ARGUMENT

THE QUESTION IS SUBSTANTIAL, AS THE DISTRICT COURT'S DECISIONS CONFLICT WITH THE DECISIONS OF THIS COURT.

In its March 11, 1992, Opinion, the District Court held that the redistricting plan for the Illinois General Assembly complied with the Voting Rights Act and the 14th and 15th Amendments to the Constitution. The Court stated, "The Plan provides a meaningful opportunity for minority voters to elect candidates of choice in areas where this opportunity is warranted by their population numbers, and does not intentionally discriminate along racial lines." LaPaille, 786 F. Supp. at 717 (App. 56).

Appellants respectfully submit that the District Court's Opinion is incorrect, is not supported by the Record and conflicts with the decisions of this

Court. The District Court in some instances in its Opinion disavowed the evidence presented by appellants and at other times completely disregarded the evidence. The resulting decision is entirely inconsistent with this Court's precedent and Congress' express mandate.

Congress has directed the courts to review the "totality of circumstances" when determining whether racial or language minority members have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). This Court, in Thornburg v. Gingles, 478 U.S. 30, 43 (1985), embraced and adopted the "totality of circumstances" analysis.

This Court, subsequent to Gingles, made clear that §2(b) of the voting Rights

Act was intended to apply to "influence" districts as well as single member districts in which the protected minority population is a majority of the district population. In Chisom v. Roember, _____ U.S. _____, 115 L. Ed.2d 348, 111 S. Ct. 2354 (1991), this Court construed §2 of the Voting Rights Act in connection with judicial elections, and in its decision, this Court recognized that the Act applies when members of a minority group have the ability to "influence" elections. 111 S. Ct. at 2365, fn. 24.

In this same vein, the United States District Court for the Northern District of Ohio in Armour v. Ohio, 775 F. Supp. 1044 (N.D. Ohio 1991), recognized that a voting rights claim can be asserted as it relates to a district in which a minority group constitutes less than a majority of

the residents of the district if the district configuration serves to dilute a minority group's voting strength.

Where a court considers voting dilution claims under the Voting Rights Act, as applied to "influence" districts, or majority-minority districts, it must consider the totality of circumstances on the basis of objective factors, including the non-exhaustive list of factors set forth in Gingles. The District Court here, however, failed to consider the "totality of circumstances" in reaching its decision.

On this basis alone, this Court's review is warranted. The District Court merely recites some of the objective factors along with electoral data which was presented by appellants in relation to their challenges to super-majority

districts as configured in the redistricting plan on the South Side of Chicago, with no analysis whatsoever. The District Court simply stated that the appellees' expert presented election results that had bearing on the challenged districts and that the opinion of the appellees' expert was "better reasoned and better supported by the record than Brace's opinion [the appellants' expert] to the extent there are conflicts between the two experts' testimony." LaPaille, 786 F. Supp. at 713. (App. 34). That is the extent of the District Court's analysis of the evidence proffered regarding super-majority minority districts.

The District Court never acknowledged for example, that the voting trends in terms of registration and turnout is low

and turning lower in the African-American communities in Chicago. Nor did it acknowledge the probability of white candidates supported by white bloc voting to win Democratic primaries in these districts, which in fact occurred in the March 1992 Democratic Primary. In Chicago, moreover, victory in the Democratic primary is tantamount to victory in the general election, as the City is dominated by one political party. Finally, appellees presented no evidence regarding the "totality of circumstances" or so-called Zimmer factors; yet the District Court nevertheless found that the supermajority African-American districts under the plan provided African-Americans a fair opportunity to elect candidates of their choice.

This Court's precedent and Congress' mandate in the Voting Rights Act call for a meaningful examination of the "totality of circumstances" surrounding an electoral device or plan. More is required than a mechanical application of a bright-line test of whether minority population exceeds 65% of the total district population. Otherwise, the statute and this Court's precedent would direct the inquiry stops when a desired population figure is achieved.

In the City of Chicago, where African-Americans experience differing economic circumstances, differing political agendas in local issues, differing local political organizations and, at the local level, differing political communities of interest, it is inappropriate to disregard those

differences, engage in the incorrect assumption that all African-Americans and their communities are alike and force rival political organizations to compete for the African-American vote in primary elections, all while a substantial white population with notoriously powerful political organizations coalesces behind one candidate. As a matter of theory, the plan adopted by the Commission is of dubious validity: projected against the backdrop of political data from past elections, the untenability of the simplistic "65% is always enough" approach was exposed, but, most egregiously, the District Court refused to reconsider its opinion when the very first elections run under the redistricting plan demonstrated the fallacy of the Commission's assumption that political realities could be

disregarded so long as desired population quotas were achieved.

In terms of the "influence" claims, the District Court refused to apply the logic of Chisom or the holding of Armour. The same situation exists in Illinois under the current redistricting plan as it did in Ohio with regard to districts that contain less than a majority of minorities: there are areas where the white population is fairly evenly divided on partisan grounds and the minority population sufficiently large and cohesive to "swing" or "influence" elections and elect the candidate of the minority population's choice from between the candidates offered by the white population. That ability, if respected by the redistricting plan, will lead to minority political empowerment, as the

competing partisan candidates chosen from the white population will seek to secure minority support by addressing and advancing the minority population's political goals.

At trial, appellants demonstrated that a 50% Hispanic House District, House District 33, could be created on the Northwest side of Chicago which would allow Hispanic voters to elect candidates of their choice or be able to "influence" elections between competing non-Hispanic groups. Appellants proposed that this be done by reducing the Hispanic population in the 3rd House District (71.3% Hispanic) and the 4th House District (70.5% Hispanic), while maintaining their super-majority minority status. All the experts at trial agreed that 65% Hispanic populations were sufficient to create

"viable" districts in House Districts 3 and 4, and there was nothing about the proposed configuration of House District 33 which threatened to impair the viability of those adjoining supermajority Hispanic districts[6].

The "influence" or "swing" district analysis as set out by the Armour court applies with equal force to the downstate districts identified by appellants as well. These districts were challenged, like in Armour, on the basis that the districts were configured in such a way that the voting strength of the minority communities was illegally reduced even though those minority communities did not

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[6] The Mendez appellants are also expected to challenge and discuss the court's decision as it relates to District 33. By order of Court granting their motion for extension, the Mendez Jurisdictional Statement will be filed in early November, 1992.

constitute a majority in a single district. Rejecting appellants' claims, the District Court found, among other things, that these claims would require a substantial amount of speculation regarding the groups' ability to form alliances with other groups to exercise voting control.

The evidence adduced at trial, however, indicates differently. The evidence illustrated that minority groups in smaller urban communities unify together in political and social orientations in support of candidates and various other civic issues. The election data established further that the plurality for specific candidates generated in precincts with a majority minority population were sufficient in specific elections to overcome the

plurality vote support generated among the white precincts for the candidate opposed by the minority population and that, in other elections, the minority vote demonstrated the potential to "swing" elections, although the minority preferred candidate was also preferred, slightly, by the white precincts. Had the minority population unified behind the other candidate, the election result would have been different.

Finally, the District Court, in a conclusory manner, stated that appellants failed to prove a discriminatory effect and motive as required under their 14th and 15th Amendment claims. Although the District Court recognized that appellants relied upon the same evidence which was introduced regarding the Voting Rights Act claims, it did not identify how

appellants' proof failed to satisfy their burden of proof under the constitutional claims. The discriminatory motive was shown through the uncontested evidence that the Commission was informed of the discriminatory effect of its proposed redistricting plan before it was adopted and the absence of any non-discriminatory, valid state purpose or interest which the redistricting plan sought to advance.

CONCLUSION

For these reasons, this case should stand for briefing and oral argument on the merits.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION, ET. AL., Plaintiffs, VS. GARY J. LaPAILLE, ET AL., Defendants.	
JOSEPH GARDNER, LOVANA JONES, DAN BARREIRO, WILLIAM SHEPHARD, JR., JOHN LEE JOHNSON, GWENDOLYN SCOTT, LAURA BARTH, WARREN DORRIS, MARVIN FRENCH, JAYME CAIN, PERCY CONWAY, JOSEPH BELMAN, LUIS ALBARASIN, CROTIS TEAGUE, JR., HENRY LANDRAU, CAROLYN TONEY, FRED SMITH, CHARLIE WILSON, JR., and BOBBY E. THOMPSON, on their own behalf and on behalf of all others similarly situated,	No. 91 C 6318

Counter-Plaintiffs,)
)
VS.)
)
ILLINOIS LEGISLATIVE)
REDISTRICTING)
COMMISSION, AL JOURDAN,)
FRANK WATSON, ROBERT)
CHURCHILL, GENE)
HOFFMAN, DALLAS)
INGEMUNSON, GEORGE)
H. RYAN, sued in his)
official capacity as)
ILLINOIS SECRETARY)
OF STATE, and)
ILLINOIS BOARD OF)
ELECTIONS,)
)
Counter-Defendants.)
)

O R D E R

Before KANNE, Circuit Judge, NORGLE, District Judge, and ZAGEL, District Judge

NORGLE, District Judge.

Before the court are the plaintiff/counter-defendants' third amended complaint seeking a declaratory judgment upholding the validity of a redistricting plan for the Illinois General Assembly approved by the Illinois

Supreme Court on January 14, 1992, and counterclaims by two sets of defendant/counter-plaintiffs challenging parts of that redistricting plan. A trial was conducted on February 4 through 7, and 11, 1992, after which the parties filed proposed findings of fact and conclusions of law. Also pending before the court is the plaintiff/counter-defendants' motion for summary judgment. For reasons that follow, judgment is entered for the plaintiff\counter-defendants and against the defendant\counter-plaintiffs on all claims.

BACKGROUND

The current claims are the latest arising from efforts to redistrict the Illinois General Assembly following the 1990 federal census. The Illinois Legislative Redistricting Commission and

its Republican majority members (the "Redistricting Commission") filed the first complaint on October 4, 1991 in this court, seeking a declaration that the redistricting plan passed by the commission that day complied with relevant federal and state laws.[1] A parallel case, challenging the redistricting plan, was filed by the Illinois Attorney General on October 11, 1991 in the Illinois Supreme Court. That court remanded the redistricting plan to the Redistricting Commission on December 13, 1991 for hearings and consideration of alternative

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[1]Additional background information on the Redistricting Commission and this litigation can be found in this court's prior opinion allowing the plaintiffs to file a third amended complaint. Illinois Legis. Redist. Comm'n v. LaPaille, No. 91 C 6318, 1991 U.S. Dist. LEXIS 19369 (N.D. Ill. Dec. 30, 1991).

plans. People ex rel. Burris v. Ryan, No. 72662, 1991 Ill. LEXIS 123 (Ill. S. Ct. Dec. 13, 1991). The commission held hearings from January 4 through 6, 1992, and passed a modified redistricting plan on January 6, 1992. The Illinois Supreme Court approved the modified plan on January 10, 1992 and issued an opinion four days later explaining its ruling. People ex rel. Burris v. Ryan, No. 72662, 1992 Ill. LEXIS 1 (Ill. S. Ct. Jan. 14, 1992).[2]

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[2]On February 24, 1992, the Illinois Supreme Court denied nine motions in the case, including motions to recall the court's mandate and for rehearing filed by several parties to both that case and the proceedings here: Illinois Attorney General Roland W. Burris, a group of African-American voters designated as the Gardner counter-plaintiffs here, and several of the Hispanic voters designated as the Mendez counter-plaintiffs here.

The court-approved plan, which was supported by the Republican majority on the Redistricting Commission, created eighteen state House of Representatives districts and eight state Senate districts with African-American "super majorities" (at least 65% of the population). The competing plan backed by the Commission's Democratic members provided for one less African-American super-majority House district and the same number of African-American super-majority Senate districts. Both the court-approved plan and its Democratic-backed alternative provided for four Hispanic super-majority districts in the House and two in the Senate.

Although the Illinois Supreme Court approved the Redistricting Commission's modified plan without change, the Commission, joined by African-American

voter David Reed ("Reed"), continued to press its declaratory judgment action in this court.[3]

Additionally, a group of African-American voters (the "Gardner counter-plaintiffs"), who had intervened in the proceedings before the Illinois Supreme Court and were named as defendants in the Redistricting Commission's third amended complaint, filed a counterclaim on January 17, 1992. The Gardner counterclaim included three counts, two of which were dismissed prior to the hearing.[4] The

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[3]Reed was added as a plaintiff in the Redistricting Commission's third amended complaint. On January 13, 1992, the day before the modified plan was approved by the Illinois Supreme Court, the Commission was granted leave to amend its third amended complaint to incorporate the modified plan.

[4]The dismissed counts were Count II, alleging partisan gerrymandering in violation of the Gardner counter-plaintiffs' 14th Amendment equal

remaining Count I alleged two types of violations of the Voting Rights Act, 42 U.S.C. §1973 et seq. First, it alleged the denial of African-American voters' "fair opportunity" to elect candidates of their choice in eight state House of Representatives districts (5, 6, 21, 23, 24, 26, 27 and 28) and three state Senate districts (3, 12 and 14) on the south side of Chicago, each of which have 65% or greater African-American populations. Second, it alleged diminution of minority voters' influence through "fracturing" of minority communities on the northwest side of Chicago (House District 33), where a 50% Hispanic district is possible, and in

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protection rights and 15th Amendment voting rights, and Count III, alleging violation of their 14th Amendment due process rights. Illinois Legis. Redist. Comm'n, No. 91 C 6318, 1992 U.S. Dist. LEXIS 818 (N.D. Ill. Jan 24, 1992).

several areas with minority populations too small to constitute a majority in a district -- Leyden Township (House Districts 77 and 78), Waukegan (House Districts 59, 61 and 62), Aurora (House Districts 42 and 94), Rock Island-Quad Cities (House Districts 71 and 72) and Springfield (House Districts 99 and 100).

The Gardner counter-plaintiffs were granted leave on February 4, 1992 to file an amended counterclaim which added a "fracturing" claim for the Champaign-Urbana area (House Districts 103 and 104) to Count I and restated the previously dismissed Counts II and III.[5] The amended counterclaim also added Count IV alleging that the Redistricting Commission adopted

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[5]Counts II and III of the amended Gardner counterclaim are dismissed for the reasons set forth int his court's January 24, 1992 order pertaining the same counts in the initial counterclaim.

its modified plan with the intention of discriminating against African-American and Hispanic voters in violation of these voters' 14th Amendment equal protection rights and their 15th Amendment voting rights.

A group of Hispanic voters (the "Mendez counter-plaintiffs"), some of whom had intervened in the Illinois Supreme Court case, filed a counterclaim on January 24, 1992, joining the "fracturing" claims of the Gardner parties with regard to the Hispanic communities on the northwest side of Chicago. This counterclaim also added "fracturing" claims for Hispanic communities on the southeast side of Chicago, in Leyden and Proviso Townships, Aurora and Waukegan. The Mendez parties, however, moved on January 31, 1992 to dismiss these latter

claims voluntarily under Federal Rule of Civil Procedure 41(a)(2), leaving only their northwest side "fracturing" claims at issue.[6]

The five-day trial was conducted in a manner similar to that utilized in other redistricting cases, see, e.g., Hastert v. State Bd. of Elections, 777 F.Supp. 634, 639-40 (N.D. Ill. 1991) (three-judge

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[6]The Mendez counter-plaintiffs' motion to dismiss without prejudice (styled as a "motion to withdraw portions of counterclaim") their voting Rights Act "fracturing" or vote dilution claims with regard to the southeast side of Chicago, Leyden and proviso Townships, Aurora and Waukegan was taken under advisement on January 31, 1992. The court now dismisses those claims with prejudice pursuant to Fed. R. Civ. P. 41(a)(2). The defendants would suffer legal prejudice if the Mendez parties were allowed to refile those claims and the defendants were forced to endure the costs of another trial on similar issues to those which have already been tried. See Ratkovich ex rel. Ratkovich v. Smith Kline, 951 F.2d 155, 157-58 (7th Cir. 1991).

panel) (and cases cited therein), with evidence submitted in the form of affidavits, depositions, maps, statistical data, and the testimony of three expert witnesses under direct and cross examination. Afterward, proposed findings of fact and conclusions of law, and post-trial briefs, were filed by the plaintiff\counter-defendants Redistricting Commission and Reed, the Gardner defendant\counter-plaintiffs, the Mendez defendant\counter-plaintiffs, and a group of African-American defendants who have joined together as the Task Force for Black Political Empowerment (the "Task Force").

DISCUSSION

I. Res Judicata and Rooker-Feldman

The Redistricting Commission and Reed argued in their January 21, 1992 motion

that the Gardner counterclaims were barred by the doctrine of res judicata because the Gardner parties either raised, or could have raised, the same claims before the Illinois Supreme Court. The Commission also contended that the Gardner parties are attempting to appeal the Illinois court's ruling to this court, which deprives this court of subject matter jurisdiction under the Rooker-Feldman doctrine. See District of Columbia Ct. of Apps. v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923). The court's January 24 opinion, dismissing Counts II and III of the counterclaim, reserved ruling on the res judicata and Rooker-Feldman issues. Illinois Legis. Redist. Comm'n, No. 91 C 6318, 1992 U.S. Dist. LEXIS 818 (N.D. Ill. Jan. 24, 1992).

The Commission also raised these issues with regard to the Mendez counterclaim in a January 31, 1992 motion, and has continued to press these issues in its post-trial brief regarding both the Gardner and Mendez counterclaims.

State court judgments must be given "the same full faith and credit" -- including preclusive effect -- in federal court as they would receive in the courts of the rendering state. 28 U.S.C. §1738; Pirela v. Village of North Aurora, 935 F.2d 909, 911 (7th Cir.), cert. denied, 112 S.Ct. 587 (1991). "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on

judicial action by minimizing the possibility of inconsistent decisions." Montana v. U.S., 440 U.S. 147, 153-54 (1979).

Under Illinois law, the doctrine of res judicata,or claim preclusion, provides that "a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." Simcox v. Simcox, 131 Ill. 2d 491, 497, 546 N.E.2d 609, 611 (1989). Res judicata applies to claims that were, or could have been, raised in a prior action. LaSalle Nat'l Bank v. County of DuPage, 856 F.2d 925, 930-31 (7th Cir. 1988) (discussing Illinois law), cert. denied, 489 U.S. 1081 (1989). Similarly, collateral estoppel, or issue preclusion, "provides that an

issue which has been addressed by a court of competent jurisdiction cannot be relitigated in a later action between the same parties or their privies...." Simcox, 131 Ill. 2d at 496, 546 N.E.2d at 611. The Redistricting Commission and Reed, as the parties asserting res judicata, have "the burden of showing with clarity and certainty what was determined by the prior judgment." LaSalle Nat'l Bank, 856 F.2d at 930.

The Illinois Supreme Court's four-page January 14 opinion explained that it approved the Redistricting Commission's modified plan on January 10 after considering four types of requirements: (1) the Illinois constitutional "equal population" requirement, (2) various Illinois and federal constitutional requirements, and federal statutory

requirements regarding minority representation, "i.e., racial, ethnic and gender," (3) compliance with the Illinois Constitutional "compactness" requirement, and (4) "all legal requirements regarding political fairness." People ex rel. Burris, slip op. at 3-4 (January 14, 1992). That court found that the Commission's modified plan "meets all four requirements" without any further explanation of what federal constitutional and statutory requirements had been applied. Id. at 4. The only constitutional or statutory standard specified in the opinion was that for reviewing the Commission's work set forth in the Illinois Constitution; the modified plan was "valid unless it is against the manifest weight of the evidence." Id. at 3 (citing Ill. Const. of 1970, art. IV, §

3(b)). There were no specific findings as to any of the four general requirements listed in the opinion.

The "thrust" of the Illinois Supreme Court's opinion was its concern for the interest of the state's voters in holding elections on time. Id. at 2. This concern and a lack of resources or time, that court wrote, prevented it "from competently drawing a map that would take into account the diverse interests at stake in this litigation." Id.

The constraints which the Illinois Supreme Court expressed are understandable. Nonetheless, under the circumstances, this court cannot find that the Illinois Supreme Court's ruling precludes the federal claims at issue. It is unclear whether that court considered or made any findings with regard to the

Voting Rights Act, the 14th Amendment, or the 15th Amendment. The Redistricting Commission and Reed have failed to meet their burden to show specifically what that ruling determined. Res judicata, therefore, cannot be applied.

The Redistricting Commission and Reed also contend that the Rooker-Feldman doctrine bars this court's review of the merits of the Gardner and Mendez parties' counterclaims. Under that doctrine, federal review of state court decisions is only available in the Supreme Court, except in habeas corpus cases. See Lynk v. LaPorte Super Ct. No. 2, 789 F.2d 554, 563 (7th Cir. 1986) (citing 28 U.S.C. § 1257; Feldman, 460 U.S. 462; Rooker, 263 U.S. 413, 416; and other cases). A federal district court, however, has subject matter jurisdiction over a federal

constitutional challenge to a state law when review of a final state court decision is not necessarily required. Feldman, 460 U.S. at 482 n.16, 486; Keene Corp. v. Cass, 908 F.2d 293, 296-297 (8th Cir. 1990).

The counterclaims here involve both federal constitutional and Voting Rights Act challenges to the modified plan approved by both the Redistricting Commission and the Illinois Supreme Court. Under the Illinois Constitution, once a plan is approved by the Commission and filed with the Illinois Secretary of State, the plan "shall have the force and effect of law...." Ill. Const. of 1970, art. IV, § 3(b). These steps took place on October 4, 1991. The Gardner and Mendez parties are therefore in effect challenging the validity of a state law.

For purposes of determining applicability of the Rooker-Feldman doctrine, the court sees no reason to distinguish between the federal Constitution and the Voting Rights Act; both are vehicles for challenging state laws. Moreover, as already discussed, it is not clear what findings were made by the Illinois Supreme Court regarding federal law, or that that court made any findings at all with regard to the merits of the counterclaims before this court. Therefore, our consideration of the counterclaims will not involve review of the Illinois Supreme Court's ruling. Accordingly, the Rooker-Feldman doctrine does not deprive this court of jurisdiction over the counterclaims.

II. Voting Rights Act

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, prohibits redistricting

plans, as well as other laws or practices, which have the effect of denying or abridging minority voters' ability to participate in electoral contests. Chisom v. Roemer, 111 S.Ct. 2354, 2363-64 (1991). An allegedly discriminatory effect is evaluated based on the "totality of the circumstances," with no requirement that the challenging parties show that the effect was intentional. Id.

The Supreme Court in Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986), set forth three preconditions for challenges to multi-member legislative districts under §2 of the Voting Rights Act, 42 U.S.C. § 1973, which appear to be applicable to § 2 challenges to single-member districting plans. See Hastert, 777 F.Supp. at 651-55. Those preconditions, which must be met before

the "totality of the circumstances" can be addressed, are (1) that the challenging minority group be large enough to constitute a majority in a single-member district, (2) that the group is politically cohesive, and (3) that racial bloc voting typically prevents the minority group from electing candidates of its choice. Gingles, 478 U.S. at 50-51.

This court, in its earlier opinion granting in part and denying in part the Redistricting Commission and Reed's motion to dismiss, allowed the Gardner parties to proceed on some Voting Rights Act counterclaims -- the "fracturing" or "influence district" claims -- for which they could not meet the first Gingles precondition. Illinois Legis. Redist. Comm'n, No. 91 C 6318, slip op. at 5-6 (N.D. Ill. Jan. 24, 1992). Finding that

applicability of the Gingles preconditions to single-member district cases was not fully settled, the court allowed these counterclaims to proceed past the dismissal stage. Id. Accordingly, the Gardner and Mendez parties were allowed to present evidence to support their claims that African-American and Hispanic voting strength was illegally diluted (or "fractured") in some areas where these minorities lacked populations large enough to constitute a majority in any one district. Nonetheless, the court finds that the Gingles preconditions provide a useful analytical framework for this case.

Additionally, the court notes that it must defer to a state-approved redistricting plan and the "policies and preferences" it comprises to the extent possible consistent with the requirements

of the Constitution and federal law. Upham v. Seamon, 456 U.S. 37, 40-43 (1982).

The Voting Rights Act counterclaims are essentially of two types: (1) the Gardner parties' claims that certain "super-majority" districts with 65% or greater African-American populations do not contain sufficient numbers of African-American voters, and (2) the Gardner and Mendez parties' claims that minority communities were "fractured" into several districts in areas where these communities are not large enough to constitute majorities in a single district.

1. Super-Majority Districts

The Gardner parties claim that African-Americans lack a "fair opportunity" to elect candidates of their choice in eight House of Representatives

districts and three Senate districts, all on the south side of Chicago, despite their super-majority status. The population statistics for these districts are as follows:

District		African-American population		
House	total	percent	voting age	percent
5	63,399	65.4	41,892	62.7
6	63,087	65.1	39,324	57.2
21	63,812	65.9	46,060	64.3
23	63,233	65.3	42,293	62.6
24	66,248	68.4	41,510	64.8
26	70,507	72.8	48,509	72.4
27	63,032	65.1	47,065	65.0
28	63,357	65.4	45,166	63.9
Senate				
3	126,486	65.3	81,216	59.9
12	129,481	66.8	83,813	63.7
14	126,389	65.2	92,231	64.4

A 65% population of a particular minority has generally been regarded by courts, the Department of Justice, and reapportionment experts as sufficient to provide that minority group with a meaningful opportunity to elect candidates of their choice. See, e.g., United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 164 (1977); Latino Political Action Comm., Inc. v. City of Boston, 784 F.2d 409, 414 (1st Cir. 1986); Ketchum v. Byrne, 740 F.2d 1398, 1413-16 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); Hastert, 777 F.Supp. at 647 and n.20; Rybicki v. State Bd. of Elections, 574 F.Supp. 1082, 1147 n.4 (N.D. Ill. 1983). The Gardner parties' expert witness, Kimball W. Brace, accepted the 65% guideline for this purpose in both Rybicki and, with

qualifications, at trial in this case.[7] Some cases also discuss a 60% minority voting age population threshold. See, e.g., Hastert, 777 F.Supp. at 647 n.20 (listing the 60% percent voting age figure in the conjunctive with the 65% overall

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[7]On cross-examination, when asked whether he agreed that 65% is the amount "generally presumed necessary," Brace said "[p]resumed without any analysis, yes; but one has to do the analysis" (Trial Transcript at 218). Later on cross, Brace described the 65% figure as a "rough rule of thumb" and said the percent actually needed varies between different areas (Tr. at 225-27). Brace also acknowledged stating, in his article Minority Voting Equality: The 65 Percent Rule in Theory and Practice, 10 Law and Policy 43 (January 1988), based on a review of 20 years of election returns in various parts of the country including Chicago, that a 62.1% minority population was sufficient to equalize minority and white voter turnout (Tr. at 223, 226-7). He additionally conceded that, in the article, he found that only a 1% upward adjustment was needed for minorities in Chicago to equalize their voter registration with that of whites, instead of the 5% figure for this purpose which is included in the 65% overall "rule of thumb" (Tr. at 226-28).

figure, suggesting that both must be met); State of Mississippi v. United States, 490 F.Supp. 569, 575 (D.D.C. 1979) (three-judges panel) (listing the voting age and overall figures in the disjunctive, suggesting that meeting either is sufficient) (cited in Ketchum, 740 F.2d at 1416), aff'd, 444 U.S. 1050 (1980). Each of the districts listed above meets the 65% overall threshold, and all but two (the House 6th and Senate 3d) meet the 60% voting age threshold, and those two narrowly miss that second guideline.

Nonetheless, the Gardner defendant\counter-plaintiffs and the Task Force defendants contend that African-American voters' opportunity to elect their chosen candidates is at risk in these districts. This claim is based on the splitting of African-American

"communities of interest," including city wards and their political organizations, community groups and church congregations into several districts in the state-approved redistricting plan. The new districts contain fragments of various groups, which will likely at times support different African-American legislative candidates, according to this argument. The multiple African-American candidacies in Democratic Party primary elections will in turn allegedly enable candidates supported by substantial white bloc voting to win primaries and be elected because winning the Democratic nomination in Chicago is tantamount to election. Another aspect of the alleged violation, asserted by tne Task Force, is the pairing of African-American and white incumbent legislators in the same districts, which

makes the African-Americans' reelection more difficult. These problems are allegedly exacerbated by declining African-American voter turnout in the affected districts while white voter turnout has remained stable.

In support of these arguments, the Gardner Task Force parties submitted election results from various elections, the expert testimony of Brace, and the affidavit of a second expert, Roger K. Oden.[8]

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[8]The Gardner parties also introduced without objection the affidavits of 14 incumbent African-American members of the Illinois General Assembly and of James W. Compton, president of the Chicago Urban League. These affidavits, which were initially filed with the Redistricting Commission, detail the splitting of wards and community groups in the state-approved plan. Both of the principal expert witnesses who testified at trial, Brace for the Gardner parties and Richard Engstrom for the Commission and Reed, said they considered the affidavits in reaching their conclusions.

According to the Gardner parties, the 1991 Chicago mayoral primary and general elections are particularly significant. Attached to the Oden affidavit were charts showing the results from the areas included in seven of the eight super-majority House districts being challenged (all but district 26) and the three super-majority Senate districts. In the primary, a white candidate, incumbent Richard M. Daley, outpolled African-American candidate Danny Davis in six of the seven listed House districts and in all three of the Senate districts, with Davis carrying only the area included in the new House District 28. A second white candidate, Jane Byrne, finished a distant third in all seven of the listed House districts and in the three Senate Districts. In the general election, Daley

beat an African-American challenger, R. Eugene Pincham, by substantial margins in all seven listed House districts and all three Senate districts. The Gardner parties cite other elections as well, including the 1987 and 1989 Chicago mayoral elections, to show waning African-American turnout and the alleged vulnerability of African-American voting rights in the challenged districts. Brace, the Gardner parties' expert, based his opinion that the challenged districts violated the Voting Rights Act on these elections and some findings in Oden's affidavit, among other factors.

In response, the Redistricting Commission and Reed cite the testimony of their expert witness, Richard Engstrom, who found the challenged districts complied with the Voting Rights Act.

Engstrom based on his conclusion on results in the eleven most-recent elections in which voters in the areas at issue had a choice between an African-American or non-African-American candidate for a city, county or state office. In House District 26, the African-American candidates were the leading vote-getters in each of the eleven elections. In the other seven challenged House districts and each of the three challenged Senate districts, the African-American candidate led the vote in all but two of the elections. The two exceptions were the 1991 Chicago mayoral primary and general elections.

The court finds Engstrom's opinion to be better reasoned and better supported by the record than Brace's opinion to the extent there are conflicts between the two

experts' testimony. Moreover, the Gardner parties bore the burden of showing that the challenged districts did not comply with the Voting Rights Act. That burden was particularly heavy in view of the 65% or greater African-American majorities in each of the eight House and three Senate districts at issue. Increasing the African-American majorities in those districts further would run the risk of diluting African-American voting strength through "packing," and thereby constitute a § 2 Voting Rights violation. See Gingles, 478 U.S. at 46 n. 11 (dilution may be caused by dispersal or by excessive concentration of minority voters); Ketchum, 740 F.2d at 1408 n.7 ("packing" -- wasting of voting strength -- may be evidenced by majorities greater than 65-70%); Hastert, 777 F.Supp at 646 (packing

wastes monitory voting power and reduces minority influence in other districts). Based on the "totality of the circumstances", the Gardner parties have failed to show that the super-majority districts violate the Voting Rights Act in any respect. The super-majority districts provide African-Americans with a meaningful opportunity to elect candidates of their choice.

2. Fracturing

Two types of "fracturing" claims under § 2 of the Voting Rights Act have been raised in this case: (1) that a 50% Hispanic district, which would allow Hispanic voters to elect candidates of their choice, should have been created in Chicago, and (2) that smaller African-American and Hispanic communities around the state should have been kept together

rather than split among several districts, reducing the minority "influence' or "swing" potential.

Regarding the first type of claim, the Gardner and Mendez parties contend that Hispanic voting strength was diluted or "fractured" on the northwest side of Chicago by the lines of House District 33, which has a 39.4% Hispanic population and 33.9% Hispanic voting age population, when a 50% Hispanic district (44.3% Hispanic voting age) could have been created by reducing the Hispanic populations in two super-majority House districts: the 3d District (71.3% Hispanic, 67.3% Hispanic voting age) and the 4th District (70.%% Hispanic, 64.9% Hispanic voting age). The Gardner and Mendez parties assert that such a 50% Hispanic district would allow Hispanics to elect candidates of their

choice, but that even if they could not, the larger Hispanic population would be able to "swing" elections between competing non-Hispanic groups.

The three experts who testified at trial -- Gordon G. Henderson for the Mendez parties, Brace for the Gardner parties, and Engstrom for the Redistricting Commission and Reed -- agreed that the 33d District could have been drawn to contain an Hispanic majority, but disagreed on the validity of such a district.

Both Brace and Henderson testified that Hispanic voters could elect candidates of their choice in the 50% district, in part because the roughly 44% Hispanic voting age population would equal the white voting age population, with African-Americans, Asians and Pacific

Islanders constituting the remainder of the district. Additionally, Brace and Henderson felt that the Hispanic super-majorities in the 3d and 4th Districts were excessive. They testified that shifting enough Hispanics from those districts to push the 33d District Hispanic population up to 50% would not harm Hispanic voting strength in the 3d and 4th Districts, where the Hispanics would retain 68% majorities.

Engstrom considered 65% the appropriate opportunity-to-elect figure for all three of the districts, without closely evaluating the demographics of each district. Raising the 33d District to 50% Hispanic would therefore not be sufficient, he reasoned. Moreover, Engstrom felt the extra Hispanics in the 3d and 4th Districts, made those districts

more secure and did not constitute "packing."

Initially, the court finds that the voting age population is a more significant factor than the overall population. McNeil v. Springfield Park Dist., 851 F.2d 937, 945 (7th Cir. 1988) (those ineligible to vote are not parties to a § 2 vote dilution claim; citing with approval cases holding that voting age population is the relevant factor in applying the Gingles single-district majority precondition), cert. denied, 490 U.S. 1031 (1989). There is no evidence that the 33d House District could be given an Hispanic voting age majority while retaining the Hispanic super-majority status in the 3d and 4th Districts. More importantly, the Gardner and Mendez parties have not shown that the 44.3%

Hispanic voting age population they seek in the 33d District would be sufficient to give Hispanic voters an opportunity to elect candidates of their choice. The record, as well as the general 65% guideline, suggest that the Hispanic voting age population must be substantially higher than 44.3% to provide such an opportunity.

A second type of "fracturing" claim -- that minority "influence" or "swing" voting potential was reduced by splitting up minority communities -- was raised by the Gardner and Mendez parties with regard to Hispanics on the northwest side of Chicago, and by the Gardner parties with regard to several smaller minority communities around the state. These other communities are as follows, showing the largest minority population both among the

encompassing state-approved districts and in one of those districts under a map suggested by the Gardner parties:

Area[9]	House Dists.
Waukegan	59, 61 and 62
Leyden Township*	77 and 78
Aurora	42 and 84
Rock Island	71 and 72
Springfield**	99 and 100

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[9]The Gardner parties' amended counterclaim lists additional areas -- Joliet, Elgin, Decatur, Bloomington-Normal, and East St. Louis ("Metro East") -- that were allegedly "fractured." These areas, however, were not discussed in the Gardner parties' post-trial brief and proposed findings of fact and conclusions of law. Any claims regarding these areas are therefore waived. See United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."); United States v. Giovannetti, 919 F.2d 1223, 1230 (7th Cir. 1990) ("A litigant who fails to press a point by supporting it with pertinent authority or by showing why it is a good point despite a lack of authority ... forfeits the point. We will not do his research for him") (emphasis in original; citations omitted).

Champaign-Urbana**	103 and 104
Top Min.Dist.	Suggested
36.5% (#59)	44.2%
12.9% (#77)	16.4%
26.9 (#84)	36.7%
15.0% (#71)	16.0%
12.7% (#100)	13.0%
11.9% (#104)	12.8%

*Hispanic only. **African-American only.

An "influence" district claim under the Voting Rights Act -- alleging that the voting strength of minority communities was illegally reduced even though those communities were not sufficiently large and compact to constitute a majority in a single district -- has been recognized by very few courts. See, e.g., Armour v. State of Ohio, 775 F.Supp. 1044, 1052 (N.D. Ohio 1991) (three-judge panel) (did not fully decide "influence" issue because

found that African-American community constituting one-third of the voting age population could elect candidates of its choice); Leblance-Sternberg v. Fletcher, No. 91 Civ. 2550, 1991 U.S. Dist. LEXIS 18835, at *30-*32 (S.D.N.Y. Dec. 24, 1991) (denying motion to dismiss where racial motivation, not just effect, alleged).

A major problem with such "influence" claims is the lack of an objective limit to such claims. See McNeil, 851 F.2d at 947 ("Courts might be flooded by the most marginal section 2 claims if plaintiffs had only to show only that an electoral practice or procedure weakened their ability to influence elections."); Hastert, 777 F.Supp. at 653-55 (discussing potential problems of measuring injury, and finding that Gingles potential single-district majority precondition "cannot

logically be limited" to challenges to at-large elections). The requirement that a minority group be large enough to control a district, not just "influence" it, enables the courts to adjudicate Voting Rights claims with a reasonable amount of efficiency and consistency. See Hastert, 777 F.Supp. at 654 (discussing court administration concerns).

The "swing" argument is based on the division between relatively large, stable voting blocs, such as the regular Democratic and Republican voters. If a minority bloc is independent, and is larger than the difference between the two major voting blocs, then the minority bloc can "swing" elections between the candidates favored by the two major blocs. Where such a pattern is established, candidates may be very responsive to the

minority bloc's concerns in an effort to win their votes. See, e.g., Solomon v. Liberty County, Fla., 865 F.2d 1566, 1583 (11th Cir. 1988) (noting lower court's finding that black voters would have more influence as county-wide "swing" voters in at-large elections than as majority in a single-member district, but rejecting that as a proper basis for relief under § 2 of the Voting Rights Act), vacated, 899 F.2d 1012 (11th Cir. 1990) (en banc).

The Gardner parties' arguments regarding "influence" districts outside of Chicago are based primarily on overall population figures, not voting age population. Brace testified about the breakdown of major voting blocs, and the ability of minority voters to play a "swing" role, in various elections in the challenged districts. This analysis is

difficult to evaluate without looking at the voting age populations in the state-approved districts. Generally, minority voting age population is presumed to be lower than the overall minority population. See e.g., Ketchum, 740 F.2d at 1415 (explaining 65% minority population guideline for opportunity to elect candidates as including 5% adjustment for "young population"). The voting strength of the minority populations is therefore presumably weaker than their overall population members would suggest.

The largest minority population increases sought in this case are 11% in District 33 on the southwest side of Chicago, which would raise the Hispanic population to 50%, and almost 10% in Waukegan, which would raise the total

minority population to 44.2% in one district. Increases of this size would likely increase the political strength of minority voters, assuming they would vote as a reasonably unified bloc. It would be difficult, however, to quantify the increased strength; any analysis would require a substantial amount of speculation regarding the minority groups' cohesiveness and ability to form alliances with other groups in order to exercise some measure of voting control. Moreover, minority voting strength would decline in adjoining districts that would lose minority voters. The net effects are uncertain.

At the other end of the scale, minority population increases of only 1% or less are sought in districts around Rock Island, Springfield and Champaign-

Urbana, and even with such increases, none of the districts would have a minority population above 16%. The "fracturing" in these areas appears insignificant. Although it is theoretically possible for a 1% increase in such relatively small voting groups to provide the decisive margin in an election, the Gardner parties have failed to show that this possibility has legal significance. Rather, these claims illustrate what Justice Cardozo called the "tendency of a principle to expand itself to the limit of its logic." Krulewitch v. United States, 336 U.S. 440, 445 (1949) (Jackson, J., concurring) (quoting Benjamin Cardozo, The Nature of the Judicial Process, 51). If 10% of the voters can "swing" an election, perhaps so can 1% or 0.1%. A single voter is the logical limit. The Gardner parties need

more than logic; they need proof. The evidence, however, does not clearly show that a 13.0% minority population in a Springfield district would be significantly more influential than the 12.7% provided for, or that a 12.8% minority would be significantly more powerful than 11.9% in a Champaign-Urbana district.

The Gardner and Mendez parties have failed to show that the state-approved map violates their rights under § 2 of the Voting Rights Act with regard to their "influence" or "swing" potential in any of the challenged districts. Their arguments in this regard are speculative and unpersuasive. Moreover, there are serious questions as to whether "swing" claims are legally cognizable under the Voting Rights Act, see Hastert, 777 F.Supp. at 651-55,

and whether they are legally manageable. See Note, Compensatory Racial Reapportionment, 25 Stan. L. Rev. 84, 99-100 (1972) (discussing possible "vote maximization test" with a minority group set up as the "swing vote" in several districts rather than as the majority in a single district; despite theoretical merit, "the courts have been both unable and unwilling to make such speculative assessments on the outcome of political events. Realistically, such a test would be judicially unworkable.") (emphasis added).

Moreover, an inability to elect a group's chosen candidates or to "swing" elections does not necessarily mean a lack of influence. Voters for losing candidates are "usually deemed to be adequately represented by the winning

candidate and to have as much opportunity to influence that candidate as other voters in the district." Davis v. Bandemer, 478 U.S. 109, 132 (1986) (plurality opinion).

Accordingly, the court finds for the Redistricting Commission and Reed on the "fracturing" counterclaims of the Gardner and Mendez parties regarding the Hispanic community of the northwest side of Chicago and of the GArdner parties regarding African-American and Hispanic communities elsewhere around the state.

III. 14th and 15th Amendments

The Gardner parties, in Count IV of their amended counterclaim, allege that the state-approved redistricting plan violates their equal protection rights under the 14th Amendment and their voting rights under the 15th Amendment. In

support of these claims, they relied upon the same evidence that was introduced regarding their Voting Rights Act claims.

Racially motivated drawing of redistricting lines, if intended to minimize or cancel the voting strength of a racial minority, violates both the 14th Amendment equal protection clause and the 15th Amendment. City of Mobile v. Bolden, 446 U.S. 55, 62-66 (1980); Hastert, 777 F.Supp. at 645; see also Beer v. United States, 425 U.S. 130, 142 n.14 (1976) (noting that the Supreme Court has never found a reapportionment plan in violation of the 15th Amendment). The court, however, as discussed previously finds that the state-approved map doe snot illegally cancel or weaken the voting strength of African-American or Hispanic voters. Additionally, we find a lack of

evidence that the Redistricting Commission was motivated by racial concerns or that the map which the Illinois Supreme Court approved was drawn along racial lines. See Wright v. Rockefeller, 376 U.S. 52, 56-57 (1964). Therefore, in addition to failing to prove a discriminatory effect for 14th and 15th Amendment purposes, the Gardner parties have also failed to prove a discriminatory motive as required under those amendments. The court accordingly finds for the Redistricting Commission and Reed on Count IV of the Gardner parties' counterclaim.

IV. Declaratory Judgment

The Redistricting Commission and Reed have pursued their complaint for a declaratory judgment under 28 U.S.C. §§2201, 2202 finding that the redistricting plan approved by the

Illinois Supreme Court is valid under the Voting Rights Act and the Constitution. In light of the evidence in this case, and as discussed above, the court finds that the state-approved plan does not violate the rights of minority voters under the § 2 of the Voting Rights Act, or the 14th or 15th Amendments. Additionally, there is an actual case or controversy regarding the validity of the state-approved plan in view of the opposition to that plan at trial by the Gardner and Mendez parties, as well as the Task Force defendants. See Atlanta Int'l Ins. Co. v. Atchison, T. and S.F. R. Co., 938 F.2d 81, 83 (7th Cir. 1991) (actual controversy required before federal court can exercise its discretionary power to issue declaratory judgments). The court deems it appropriate to issue the declaratory

relief requested by the Redistricting Commission and Reed, and the state-approved redistricting plan is therefore declared to be in compliance with the applicable federal law and constitutional provisions.

CONCLUSION

The court finds, based on the record as a whole, that the redistricting plan for the Illinois General Assembly approved by the Illinois Legislative Redistricting Committee and the Illinois Supreme Court complies with the Voting Rights Act, the 14th Amendment and the 15th Amendment. The plan provides a meaningful opportunity for minority voters to elect candidates of their choice in areas where this opportunity is warranted by their population numbers, and does not

intentionally discriminate along racial lines.

Consequently, the court finds for plaintiff\counter-defendants Redistricting Commission and Reed on Counts I and IV of the Gardner defendant\counter-plaintiffs' counterclaim, and on the Mendez defendant\counter-plaintiffs' counterclaim; Counts II and III of the Gardner defendants' counterclaim are dismissed; and the state-approved redistricting plan is declared valid under the applicable federal law and constitutional provisions. The Redistricting Commission and Reed's motion for summary judgment is denied to the extent it seeks to bar the Gardner and Mendez counterclaims on grounds of res judicata and the Rooker-Feldman doctrine,

and is otherwise rendered moot by the court's judgment.

IT IS SO ORDERED.

ENTER:

CHARLES RONALD NORGLE, SR.,
Judge United States
District Court

Dated: 3-11-92

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION, ET AL., Plaintiffs, v. GARY J. LaPAILLE, ET AL., Defendants.	
JOSEPH GARDNER, LOVANA JONES, DAN BARRIERO, WILLIAM SHEPHARD, JR., JOHN LEE JOHNSON, GWENDOLYN SCOTT, LAURA BARTH, WARREN DORRIS, MARVIN FRENCH, JAYME CAIN, PERCY CONWAY, JOSEPH BELMAN, LUIS ALBARASIN, CROTIS TEAGUE, JR., HENRY LANDRAU, CAROLYN TONEY, FRED SMITH, CHARLIE WILSON, JR., and BOBBY E. THOMPSON, on their own behalf and on behalf of all others similarly situated, Counter-Plaintiffs, v. ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION, AL JOURDAN, FRANK WATSON, ROBERT CHURCHILL, GENE	No. 91 C 6318

HOFFMAN, DALLAS)
INGEMUNSON, GEORGE H.)
RYAN, sued in his)
official capacity as)
ILLINOIS SECRETARY OF)
STATE, and ILLINOIS BOARD)
OF ELECTIONS,)
)
Counter-Defendants.)

O R D E R

Before KANNE, Circuit Judge, NORGLE, District Judge, and ZAGEL, District Judge

NORGLE, District Judge.

Before the court are post-trial motions by two groups: a motion for a new trial by a group of defendant/counter-plaintiffs known as the Gardner parties, and a motion to alter or amend the judgment, or alternatively for a new trial, by a group of defendants who have joined together as the Task Force for Black political Empowerment ("Task Force"). For reasons that follow, the motions are denied.

This litigation involves challenges to a decennial redistricting plan for the Illinois General Assembly approved by the Illinois Legislative Redistricting Commission on January 6, 1992 and upheld by the Illinois Supreme Court on January 10, 1992. People ex rel. Burris v. Ryan, 147 Ill.2d 270, 588 N.E.2d 1033 (1992) (January 14 opinion explaining January 10 ruling). This court conducted a trial on February 4 through 7, and 11, 1992 and subsequently issued an opinion declaring the redistricting plan valid and rejecting various defendant/counter-plaintiffs' challenges to that plan. Illinois Legis. Redist. Com'n v. LaPaille, No. 91 C 6318, 1992 U.S. Dist. LEXIS 2930 (N.D. Ill March 11, 1992).[1]

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[1] For additional background information, see this court's other prior rulings allowing plaintiffs to file a

The Illinois primary election was held on March 17, 1992, six days after this court declared the redistricting plan valid. The instant motions by the Gardner parties and the Task Force, both filed on April 3, 1992, seek a new trial at which the results of the March 17 primary election could be considered by the court. The Gardner motion was brought under Federal Rule of Civil Procedure 59. The Task Force motion, however, does not mention Rule 59 or any other rule. Nonetheless, the court will construe the Task Force motion under Rule 59.

"Motions for a new trial or to alter or amend a judgment must clearly establish either a manifest error of law or fact or

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third amended complaint, 782 F.Supp. 1267 (1991), and dismissing Count II and III of the Gardner parties' counter-complaint. 782 F.Supp. 1272 (1992).

must present newly discovered evidence." Federal Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986). To qualify as "newly discovered evidence" under Rule 59, the evidence "must have been in existence at the time of trial . . . ." Peacock v. Board of Sch. Comm'rs, 721 F.2d 210, 214 (7th Cir. 1983). Moreover, "[t]he evidence must be material, admissible, credible, not merely cumulative or impeaching, and likely to change the outcome upon retrial." Id. at 213-14. Finally, whether to grant or deny a motion for a new trial is discretionary. EEOC v. Century Broadcasting Corp., 957 F.2d 1446, 1460 (7th Cir. 1992).

The election results which form the basis for the Gardner parties' and the Task Force's motions were not in existence at the time of trial. The Gardner parties

argue, however, that such evidence may warrant a new trial motion if the new evidence makes a "prima facie showing that a different result should have been reached initially . . . ." Unarco Indus., Inc. v. Evans Prods. Co., 403 F.2d 638, 639 (7th Cir. 1968); see also Peacock, 721 F.2d at 214 ("[m]aterial not in existence until after trial falls within 60(b)(2) only if it pertains to facts in existence at time of trial"; same requirements under Rules 59 and 60(b)(2)).

The new evidence proffered by the Gardner parties and the Task Force, however, does not sufficiently cast doubt upon the trial result so as to warrant a new trial. The Gardner parties and the Task Force argue that the primary elections results prove their arguments at trial that several Illinois Senate and

House districts on the South Side of Chicago with African-American super-majorities of 65% or more were inadequate to provide a meaningful opportunity for African-American voters to elect candidates of their choice. The Gardner parties specifically cite three House districts (Nos. 23, 24 and 28) and one Senate district (No. 12) in which white candidates prevailed over African-American candidates in the Democratic primary. The Task Force similarly cites those districts as well as House district 29 and 32. Each district which the Gardner parties and the Task Force cites featured a single white candidate running against multiple African-American candidates.

The cited primary results establish, at most, that African-Americans' chosen candidates were not guaranteed election.

That is clearly insufficient under both the Voting Rights Act, 42 U.S.C § 1973(b) -- "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population" -- and the 14th Amendment equal protection clause. City of Mobile v. Bolden, 446 U.S. 55, 75-77 (1980) (right to equal participation does not protect any particular group from electoral defeat). The primary results do not show that African-Americans in the cited districts were denied a meaningful opportunity to elect their chosen candidates.[2]

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[2] The Gardner parties' and Task Force's reliance on results from districts with multiple African-American candidacies arguably undermines their arguments in view of the three Gingles preconditions for a Voting Right Act claim, the second of which requires that the minority group at issue be politically cohesive. Thornburg v. Gingles, 478 U.S. 30, 50-51

Accordingly, the Gardner parties and the Task Force have failed to show that a new trial, or any alteration of the judgment previously entered, is warranted.

CONCLUSION

The Gardner parties' motion for a new trial and the Task Force's motion to alter or amend the judgement or alternatively for a new trial are denied.

IT IS SO ORDERED.

ENTER:

_____

CHARLES RONALD NORGLE, SR., Judge
United States District Court

DATED: _____

(1986).

APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION, AL JOURDAN, FRANK WATSON, ROBERT CHURCHILL, GENE HOFFMAN, and DALLAS INGEMUNSON,	)	
Plaintiffs,	)	
vs.	)	No. 91 C 6318
	)	JUDGE NORGLE
GARY J. LaPAILLE, etc., et al.,	)	JUDGE KANNE
	)	JUDGE ZAGEL
Defendants.	)	MAGISTRATE WEISBERG
	)	
JOSEPH GARDNER, LOVANA JONES, DAN BARRIERO, WILLIAM SHEPHARD, JR., JOHN LEE JOHNSON, GWENDOLYN SCOTT, LAURA BARTH, WARREN DORRIS, MARVIN FRENCH, JAYME CAIN, PERCY CONWAY, JOSEPH BELMAN, LUIS ALBARASIN, CROTIS TEAGUE, JR., HENRY LANDRAU, CAROLYN TONEY, FRED SMITH, CHARLIE WILSON, JR., and BOBBY E. THOMPSON, on their own	)	

behalf and on behalf of all others similarly situated,	)	
Counter-Plaintiffs-Appellants,	)	
v.	)	RECEIVED JUL 10 1992
ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION, AL JOURDAN, FRANK WATSON, ROBERT CHURCHILL, GENE HOFFMAN, DALLAS INGEMUNSON, GEORGE H. RYAN, sued in his official capacity as ILLINOIS SECRETARY OF STATE, and ILLINOIS BOARD OF ELECTIONS,	)	H. STUART CUNNINGHAM UNITED STATES DISTRICT COURT
Counter-Defendants-Appellees.	)	

NOTICE OF APPEAL

Now comes counter-plaintiffs-appellants, Joseph Gardner, Lovana Jones, Dan Barreiro, William Shephard, Jr., John Lee Johnson, Gwendolyn Scott, Laura Barth, Warren Dorris, Marvin French, Jayme Cain, Percy Conway, Joseph Belman, Luis Albarasin, Crotis Teague, Jr., Henry

Landrau, Carolyn Toney, Fred Smith, Charlie Wilson, Jr., and Bobby E. Thompson, on their own behalf and on behalf of all others similarly situated, by their attorneys, and pursuant to federal Rule of Appellate Procedure 4(a)(4), United States Supreme Court Rule 18, and 28 U.S.c. §§1253, 2101 hereby appeals to the Supreme Court of the United States, from the Order entered on March 11, 1992 (a copy of which is attached hereto as Exhibit 1) [App. 1-58] finding that the redistricting plan for the Illinois General Assembly approved by the Illinois Legislative Redistricting Committee and the Illinois Supreme Court complies with the Voting Rights Act, the 14th Amendment and the 15th Amendment, and the Order entered on June 11, 1992 which was docketed on June 15, 1992 (a copy of

which is attached hereto as Exhibit 2) [App. 59-67] denying counter-plaintiffs-appellant's motion for a new trial and the Task Force's motion to alter or amend the judgment or alternatively for a new trial.

By this appeal, counter-plaintiffs-appellants will ask the Supreme Court to issue an order scheduling briefing and oral argument on the merits in order to review both Orders of the three-judge district court, reverse both Orders and enter judgment in favor of counter-plaintiffs-appellants, or in the alternative, to reverse both Orders, and remand this cause for further proceedings as determined by the Supreme Court and to grant such other and further relief as to which counter-plaintiffs-appellants may be entitled to on appeal.

JURISDICTIONAL STATEMENT

The Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. §1253. The three-judge United States District Court for the Northern District of Illinois entered an Order on March 11, 1992 and an Order on June 11, 1992 which was docketed on June 15, 1992, and pursuant to United States Supreme Court Rule 18 and 28 U.S.C. §2101, the present notice of appeal is timely and appropriate for consideration by this Court. In compliance with United States Supreme Court Rule 18, a jurisdictional statement shall be filed by the counter-plaintiff-appellants with the clerk of the Supreme Court as prescribed.

Respectfully submitted,

_____

One of the Attorneys for the Gardner Counter-Plaintiffs-Appellants

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